UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. NEW INDY CATAWBA, LLC, Defendant.	Case No.: 0:21-cv-02053-SAL

UNITED STATES' OPPOSITION TO MOTION TO RECONSIDER

Plaintiff opposes the Motion to Reconsider filed by several putative Intervenors (Dkt. 39), which asks this Court to reverse or overturn part of its Order denying intervention (Dkt. 38).

I. Rule 59 & 60

Putative Intervenors accurately point out that Rule 59 applies if the district court makes a "clear error" and that Rule 60 applies in "extraordinary circumstances." Dkt. 39 at 2. The United States posits that neither of those tests are met here, for reasons discussed below.

II. Background: Facts and Procedure

Several facts are relevant to a proper understanding of why the putative Intervenors' motion should be denied.

First, the Complaint did not allege violations of the EPA Order, nor violations of any standard or limitation: the Complaint alleged a substantial endangerment to human health. Dkt. 1. The Complaint did indeed "reserve" the right to amend or otherwise seek additional relief but did not actually allege such claims.

Second, the EPA Order expired 74 days after it was issued, per the terms of section 303. 42 U.S.C. § 7603 (automatic expiry in 60 days plus 14 more days if a civil action is filed). The

Court converted certain numerical emission requirements of the EPA Order into a series of judicial injunctions. Dkt. 6. Any "emission limits" that putative Intervenors claim New Indy has violated since then are no longer required by the EPA Order, but rather required by this Court's injunction (Dkt. 6). Defendant has complied with the Court's injunctions for over a year.

Third, since the putative Intervenors filed their motion to intervene (Dkt. 7)—and since the Court denied it (Dkt. 38)—the United States has requested that the Court approve and enter the proposed Consent Decree, which would take the numerical requirements of the injunctions (and many additional operational requirements) and turn them into a final decree, and ultimately turn the requirements into permanent permit conditions. Dkt. 40.

Finally, the Consent Decree, if approved, would "resolve" the claim in the Complaint as well as any violations of the EPA order, even though such violations were not alleged in the Complaint.[1] Thus, while the Complaint does not allege violations, the Consent Decree does resolve them. Meanwhile, "Defendant does not admit any liability" for such violations. Dkt. 27-1 (Proposed Consent Decree) at 4.

III. Argument

What is not at issue. The putative Intervenors concede that this Court's Order denying intervention (Dkt. 38) is correct on all fronts except one. The Court and the parties all agree that there can be no citizen suit to directly seek relief to abate an endangerment under section 303, as no "standard or limitation" applies. Putative Intervenors have waived all arguments other than intervention of right under Fed. R. Civ. P. 24(a)(1) and 42 U.S.C. § 7604(b)(1)(B); even as to that

[1] Proposed Consent Decree (Dkt. 27-1) ¶ 64 ("This Consent Decree resolves the civil claim of the United States alleged in the Complaint filed in this action through the date of lodging, and also resolves the United States' claims for a civil penalty for any violations of the EPA Order and/or the Consent Order from May 13, 2021 through the date of lodging of this Consent Decree.").

limited argument, they have waived the argument that they could bring a direct claim under section 303 for an imminent and substantial endangerment. Thus, only four paragraphs of the Court's Order are at issue in the motion to reconsider (Part II.A.3, pages 19–20, from "Relatedly" through the discussion of *Volkswagen*). The other 23 pages are not at issue.

What is at issue. The sole avenue that putative Intervenors seek is to "enforce the standards and limitations set forth in the May 13, 2021 Emergency Order." Dkt. 39 at 4. Putative Intervenors argue that—even though they could neither file a separate suit nor intervene in EPA's suit to seek an injunction to abate an endangerment—if EPA elects to issue an administrative order, then all citizens become vested with the power to enforce such an order. Thus, they posit, EPA's issuance of an administrative order that includes a schedule or an emission number creates the right to file a citizen suit.

The CAA's section 304 citizen suit provision allows a party to intervene when the government is prosecuting either **(1)** a violation of an emission standard or limitation, or **(2)** a violation of an order "with respect to such" an emission standard or limitation. The Court correctly held that **(1)** the case is not about an emission standard or limitation, and **(2)** the EPA Order was not issued "with respect to such" a standard or limitation, because it was issued "with respect to" a condition endangering the public even though no standard or limitation applied. Dkt. 38 at 20.

Putative Intervenors highlight the Court's use of the word "predicated." The Court simply determined that the words "with respect to such" had meaning: only if an EPA order is "with respect to" an emission standard or limitation do the citizens have a right to sue. Using the word "predicated on" in lieu of "with respect to" is a distinction without a difference.

While putative Intervenors place much weight on the premise that the Complaint alleges a violation of the EPA Order,[2] the Complaint does not allege a violation of the Order, nor does it seek any remedy for violations of the EPA Order; the Complaint seeks to abate an endangerment.[3]

Practicalities. It is unclear what role the putative Intervenors would play in this civil action if the Court chooses to enter the Consent Decree.

First, there would be no basis for an injunction to abate the endangerment in general, as Intervenors agree with the Court that they cannot seek such an injunction. As for an injunction to require compliance with the EPA Order, that order has already expired and has been replaced by the Court's injunctions (Dkt. 6). The Consent Decree requires all of the same substantive requirements of the EPA Order and the injunctions, along with numerous additional items. If the Consent Decree is entered, there is nothing left to enforce from the EPA Order, nor anything to enforce from the Court's injunctions (Dkt. 6). Even without the Consent Decree, the Court's injunctions also required New Indy to continue to monitor, report, and meet the 70 and 600 ppb requirements. Dkt. 6.

Second, as for a penalty to punish any violations of the EPA Order, the proposed Consent Decree requires a $1.1 million penalty (25% of the maximum legally authorized amount) and "resolves" the potential violations. As explained in the Motion to Enter (Dkt. 40), putative Intervenors find the penalty "unreasonably meager," and their position on the issue is set out

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[2] *See* Dkt. 39 at 3 ("where, as here, EPA has alleged that New Indy Catawba has violated limitations and standards prescribed by the May 13, 2021 Emergency Order"), at 4 ("the EPA's suit alleges violations"), and at 8 ("where EPA has alleged a violation of a standard or limitation, as here").

[3] Indeed, putative Intervenors state that because the Complaint "contemplates" a reservation to seek penalties for a violation, the Complaint therefore "serves the . . . purpose of . . . alleging violations" of the Emergency Order. *Id.* at 8. A reservation of claims is the converse of actually stating those claims.

clearly in the comments submitted regarding the proposed Consent Decree. (Comments attached as Exhibit 1 to Motion to Enter Dkt. 40-2 through 40-6; at Dkt. 40-3 pp. 3, 36-39 discuss the penalty). Putative Intervenors submitted lengthy comments on the proposed Consent Decree, of which three pages out of 40 discussed the civil penalty. None of their expert reports mention the civil penalty. Dkt. 7-3, 7-4, 7-5, 7-7, 7-8, 7-9, and (Dkt. 38 struck the following from the record) 26-1, 26-4. So, if this Court—having been informed of the putative Intervenors' comments and the government's responses thereto—decides that $1.1 million is fair, reasonable, and consistent with the CAA, there would be nothing left for the putative Intervenors to seek as additional penalties.

IV. Conclusion

Plaintiff requests that the Court deny the motion to reconsider (Dkt. 39), because the Court's analysis in the Order (Dkt. 38) is sound.

Respectfully submitted,

ADAIR FORD BOROUGHS
UNITED STATES ATTORNEY

BY: */s/Johanna Valenzuela*
Johanna C. Valenzuela
Assistant United States Attorney
Federal Bar No. 11130
United States Attorney's Office
District of South Carolina
Tel. (803) 929-3122
E-mail: johanna.valenzuela@usdoj.gov

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Steven O'Rourke
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

Washington, DC 20044-7611
Tel. (202) 514-2779
Email: steve.o'rourke@usdoj.gov

OF COUNSEL:
Marirose J. Pratt
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 4